The Key to Voir Dire: Use Your EAR

by Susan Macpherson and Jeremy Rose

When you sit down to draft a voir dire, the first questions that come to mind are usually those that deal with experiences similar to the facts of the case and the issues to be decided. In a medical negligence case, you need to know whether any of the jurors have personal experience with the plaintiff's prior and/or current medical condition. In a fraud case, you need to identify those who suffered financial losses in business deals. What may not come to mind are the questions that will help you evaluate the impact of those experiences. Jurors make decisions based on their attitudes and cognitive schemas, both of which are strongly affected by their experiences but often in unpredictable ways.

Some attorneys (and many judges) rely on the juror to evaluate the impact of prior experiences, but in most cases, that is akin to putting the juror in the driver's seat and asking whether he or she will have any trouble reaching the destination without identifying what it is. Knowing what the case is about and what has to be decided is the only way a juror could begin to make a reasonable assessment. But most judges sharply limit what jurors can be told. Given little or no information on where the case is headed, jurors have a very limited ability to judge the influence of their past experiences. For that reason, your follow-up questions should be designed to accomplish two goals: 1) help a given juror articulate – perhaps for the first time – the impact of prior relevant experiences, and 2) allow you – and perhaps the judge – to make a more informed assessment of jurors as possible candidates for a cause or peremptory challenge.

A simple guide for structuring your questions to accomplish those goals is to follow the sequence of **E**xperience, **A**ttitude, **R**ule. Using the **EAR** approach when drafting voir dire will help you to remember to follow through by **asking**, rather than **assuming,** that you know how jurors have processed their experiences. Making assumptions about the ways in which a juror has (or has not) processed her experiences can lead to serious mistakes in jury selection. You may fail to remove a juror whom you actually could have challenged for cause, and likely would have removed with a peremptory if the challenge was denied, or you may end up removing a juror who would have been a strong advocate for your side.

The **EAR** acronym should also help you remember that your most important job in voir dire is to **listen**. Lecturing, rather than listening, is the other way that serious mistakes are made in jury selection. You won't get the information you need to challenge the right jurors if you don't hear all of what they have to say about their **E**xperiences, their **A**ttitudes, and the **R**ules they may follow in deciding your case. Jurors' rules are the conclusions or "take away" knowledge that results from the way in which they have processed their life experiences.

A basic decision (that needs to be made well in advance of the trial date) is whether you are better off asking the EAR questions in voir dire or on a questionnaire. There are certain experiences that jurors may resent being asked to discuss in open court, and some may simply refuse to divulge the information requested, even if offered the opportunity to do so at the bench.

Because going to the bench for questioning still requires a juror to indicate that he or she has experience with a

sensitive subject, the embarrassment of simply being identified as someone in that category will keep some sitting on, rather than raising, their hands. For example, those who have suffered or been accused of sexual, physical, or emotional abuse, those who have been treated for psychological problems, or those who have been accused of wrongdoing at work may never have discussed that matter with anyone else and understandably resist being asked to do so in a public setting.

Using a questionnaire increases the likelihood that jurors will report uncomfortable experiences and candidly describe how that has affected their attitudes and beliefs. It may still be necessary to follow up with some of those jurors at the bench or with a sequestered questioning, as the full set of probes into their attitudes and rules would make the questionnaire too lengthy. (To encourage continued cooperation and candor, it is important that the jurors can be summoned for follow up without the other members of the panel knowing the topic(s) being discussed.) However, even if questionnaire length were not an issue, you would want to see how the juror looks and sounds when describing the impact of any relevant experience. Written explanations are very susceptible to misinterpretation (as we have all learned in trying to discern the true tone of an email) or posturing by a juror who wants to give a socially desirable response.

While a questionnaire is always an option to consider, there are times when you would gain valuable insights by being able to use one juror's experiences, attitudes, and rules as a springboard for questioning others. Some view the potential for exposure to problematic responses as too risky, but it actually presents a better opportunity to identify those you may wish to strike or challenge for cause. Those on the panel who share the problematic perspective are more likely to identify themselves if another juror has already spoken up. After thanking the juror with a problematic answer for their candor to reinforce that honest answers are the right answers, always ask, "Who else has had the same experience or feels the same way?" Once those jurors have been identified and questioned, you can decide how far you want to go in identifying those with the opposite views. There are two considerations to weigh at this point: one is that they may be your most favorable jurors, and you don't want to help your opponent spot them. The other is that an astute opponent is going to spot them anyway, so you may as well encourage them to fully express the opposite view, particularly if they are likely to have developed a rule that is closer to the rule of law you are asking jurors to enforce.

Let's look at how this might work in practice. Prospective jurors in a medical negligence case are asked about their experiences with the same or similar medical conditions and errors that are at issue in this case. One juror has a similar experience, a very resentful attitude, and follows the rule that doctors simply can't be trusted. Another juror with a similar experience is grateful to have survived with no permanent injuries and follows the rule that doctors have to be held accountable for their mistakes just like everyone else. You need to know which rule the other jurors on the panel tend to follow, and having jurors put both perspectives on the table makes it easier to do so.

Reluctance to let other jurors hear the problematic answers is based on the assumption that attitudes are contagious. The reality is more complicated. Jurors who can be influenced by exposure to problematic responses are already predisposed to adopt that perspective. The factors that make them more receptive are also likely to make them more receptive to your opponent's arguments. Jurors who are not primed to adopt problematic responses are not going to "catch" a bad attitude or change the rules they personally choose to follow over the course of a voir dire. Remember at this point in the trial, jurors have no particular need to analyze and agree or disagree with the opinions being expressed by other jurors. Many report being somewhat inattentive as they are fairly preoccupied with the possibility of being selected and the logistical challenges that will entail at home or at work. Because prospective jurors are most interested in figuring out what the case is about, they often remember more about the attorney's **response** to a problematic answer than the answer itself. If attorneys appear anxious to cut off responses that don't appear to support their case, that impression is often retained as a clear signal about the strength of the evidence supporting the claim or the defense. Conversely, attorneys who do not flinch when adverse views are expressed send a message of confidence in their case.

The EAR structure prevents you from making a common mistake which is to jump too quickly to the bottom line of a juror's ability to be fair and impartial. Many attorneys follow up the experience question with one that asks jurors to evaluate the impact of the experience, e.g., "How will that experience affect your views of this case?" If the question is being asked by a judge, it may be even more pointed: "Is that going to affect your ability to be a fair and impartial juror in this case? Can you set that aside?" Jurors tend to hear those questions as "Are you a fair person?" It is not surprising that the answer to the judge's question is usually "Yes," and the answer to the attorney's question is often, "It won't," when earlier answers indicate a clear bias that is based on prior experiences. Once the juror says any variation of, "I can be fair," it becomes very difficult to further explore grounds for a cause or peremptory challenge. Even if you succeed in getting additional information that would warrant a cause challenge, many judges will deny it out of hand if the juror has already said the magic words: "I can be fair."

The other problem with jumping too quickly to the bottom "Can you be fair?" line is that jurors want to do what is expected of them and will say they can follow the judge's instructions without thinking through why that might be difficult or even impossible. Of course those who have been denied a legitimate hardship request or just really don't want to be there will occasionally say, "I can't be fair" as a thinly disguised exit strategy. But most will readily agree that they can set their experiences aside and judge the case based on the evidence alone because they know that's what jurors are supposed to do. We rarely hear what is often the real answer to the "set aside" question which is: "I don't know."

There are many reasons that people can't easily evaluate how their experiences will influence their judgment as jurors. Here are three of the main ones: 1) it takes a high level of self-awareness about one's own biases and decision-making processes which many jurors simply don't have; 2) as indicated above, most jurors have no idea how their experience compares to what happened in this case or touches on what they will be asked to decide; and 3) many people have never had any reason to consider how past experiences have shaped their attitudes and subsequent decisions. That is why it is important to explore both the jurors' attitudes and rules before you jump to the bottom line. The answers will help you, and will often help the juror, think through the potential impact of prior related experiences.

When asked to make sense out of competing versions of the facts, jurors often use their own experiences to sort out "what really happened" or decide which witness to believe. Think of post-verdict interviews when you have heard a juror say something along the following lines, "We were stuck on one point and couldn't agree on which witness to believe, but then one juror said she had a similar experience with . . . and that helped us decide." A juror who says, "I know how these things work" can have a strong influence on other jurors who are struggling to figure out a way to reach a decision. If you have used jury research to prepare for trial, you have most likely observed mock jurors freely injecting their own experiences and using those experiences as a springboard for decision-making, while the backroom observers may be saying with dismay, "But that has **nothing** to do with this case!" Remember that the similarities between jurors' experiences and the case facts or issues – however remote they may seem to you – are likely to be more important and potentially more influential than the differences.

This should not be read as a critique of jurors' decision-making processes, as it is the process by which we all tend to evaluate unfamiliar and confusing situations. The process of searching one's personal database for similar situations brings forth not only the facts of the past experience, but also the attitudes and the conclusions or rules produced by that situation. It is that complete package that needs to be uncovered in voir dire.

The Question Sequence: Discover Experience First

Always ask about related experiences in a way that focuses jurors' attention: "This case involves an injury caused by a doctor not paying attention to medical test results. How many have had a similar experience?" Or, "This case involves a long-term business partnership that went sour. Has anyone had a similar experience?" All jurors know the answer to any question about their past experiences, so it is easy to volunteer a response. Getting the conversation going reduces some of the anxiety many jurors feel at the outset of voir dire.

As you begin to get responses, pay attention to the juror's choice of words, speech patterns (tone, pace, hesitations), and nonverbal behavior as the juror describes the experience. These may provide important clues to the juror's underlying or unresolved feelings about the experience. Be sure you ask the juror to **describe** the experience, and not to just give you a conclusion as to whether it was or was not similar to the case at hand.

If the juror answers by describing an experience that may initially seem to you to be unrelated, that is a signal to pay even closer attention. Why does the juror draw a connection between your question about experience with ignoring medical test results and a doctor's "lucky guess" as to a rare diagnosis? Don't assume you know the answer, **ask:** "Tell me how your experience is similar to, or differs from, the situation I described?"

When jurors start to describe experiences that sound like it would make them hostile to your case, resist the urge to cut them off and instead encourage them to keep talking. Your assumptions about them being a "bad" juror may be wrong once you have heard more, and the more they talk about that experience, the easier it will be to make the case to the judge that they are biased if you ask for a cause challenge.

Follow-up probes include: "When did that happen?" "What was the outcome of that experience?" "What did you tell others about it?" "When you talk to people about that experience, what is the hardest part to convey?" "Do you think about that experience often?" If you are asking about sensitive issues and not using a questionnaire, offer privacy where appropriate in a way that makes it easy for jurors to accept. Say: "We could talk about this at the bench if you'd like to do so." Do not ask: "Do you need to come up to the bench?"

Attitudes: Evaluate Jurors' Reaction to the Experience

Use experiences as a springboard to asking about specific attitudes. Do not initially suggest the specific attitude you assume would be produced by an experience. Keep it open-ended by asking, "How did you feel?" rather than, "Did you resent that?" Describing the reactions to an experience can help jurors begin to recognize their own biases or preconceptions. If the judge does ask the "Can you be fair?" question later, it will be harder for the juror to simply say, "Yes I can set that aside" after explaining his or her emotional reaction.

Jurors whose reported attitudes are inconsistent with their reported experiences should be flagged for further assessment. When you suspect a juror may be reluctant to tell you how they really felt because it would appear adverse to your case, give the juror "permission" to express that view. For example, if you represent the plaintiff in a contract dispute and the juror has described a substantial loss due to a breach of contract, but denied any emotional reaction say: "Some people might feel pretty resentful if a former business partner accused them of breaking a contract, while others feel anything goes in the business world. Which is closer to your reaction?"

Even if a juror has not reported a relevant personal experience, listening to other jurors do so can trigger reactions that give you a better way to assess their attitudes than asking questions in the abstract. For instance, you may say, "Listening to Mr. Smith talk about this experience with a competitor hiring his employees, what's your reaction to that business practice?"

Remember that initial attitudes may change significantly over time. For very remote experiences, it is wise to distinguish between the initial and current reactions: "What was your reaction at the time? Looking back on it now, how do you feel about what happened?"

Look for signs of unresolved anger, bitterness, or cynicism. All can be targeted in ways that are difficult to predict. People who have been injured by a defective product but received no compensation for it, for example, could just as easily blame the plaintiff in a product liability case as the manufacturer.

Rules: Learn Jurors' Experience-Based Conclusions

Don't assume that you can guess the **"rule"** or the lesson the juror has drawn from an experience based on hearing his or her reactions. If you are wrong, you could be **very** wrong. Someone harmed by a doctor's negligence may believe that more doctors should be held responsible for causing harm **or** that everyone knows doctors are careless so the plaintiff should not have relied on the diagnosis without getting a second opinion. The rule a juror follows after a financial loss resulting from a breach of contract may be, "Always get *everything* in writing" or, "A contract is no better than a handshake."

Some rules may be based on the experiences of others who are close to the juror or simply the juror's observations about how the world works. As with the attitude questions, you can use one juror's rules as a way to get other jurors talking about their own "rules of thumb." Some commonly held rules include: "The plaintiff is automatically 10% at fault in any automobile accident"; "It's not negligence if it's not on purpose"; or "Investors have no legal right to rely on what the sales people say."

Many potential cause challenges remain under-the-radar when attorneys forget to ask whether jurors have their own ideas about the relevant rules. Find out if a juror's "rule" differs from the rule of law **before** you shift to asking for opinions about the law. Once you start talking about "the law," jurors will be less inclined to volunteer any differences of opinion based on their own rules because jurors know (and are often repeatedly reminded) that they are supposed to say they will follow the law.

EAR in Practice

The following are brief examples of using the EAR approach in several types of cases.

Defending a criminal charge of murder with self defense:

E = What experience have you had with fist fights, bar fights, or people who might throw a punch when they get upset?

A = How did you feel about that at the time? And looking back on it now, could you tell when things were going to get out of hand? How? What do you think caused those involved to lose control?

R = What are your views about when it is ok to defend yourself? What are your views about the use of force? When do you think there is an obligation to retreat?

A medical negligence case:

E = What experience do you have with doctors not responding promptly when called?

A = How did you feel about the delay in getting a response? Did you get any explanation as to why there was a delay? How did you feel about what the doctor said?

R = How do you handle medical emergencies as a result of that experience? How do you expect medical providers to respond?

A business dispute involving a "raid" of a competitor's employees:

E = Has a competitor ever tried to recruit current employees at your company?

A = How do you view that practice? How did your employer respond? What did you think about that response? What impact did that have on other employees who wanted to leave the company?

R = How do you see that situation – is it typical or the exception to the rule in your industry? What are your views about the right way to recruit a competitor's employees? What types of recruiting efforts cross the line?

Using EAR To Get Cause Challenges

The key to getting cause challenges in general is to help the juror recognize why he or she would not be a suitable juror for this particular case. That is often a formidable task, not only because jurors knows they are supposed to say they can be fair and impartial, but also because admitting to "a bias" can feel like confessing to being a flawed human being, and admitting to the inability to set it aside can feel like shirking a civic duty.

Using the EAR structure for voir dire can help reduce these concerns by avoiding the label of "bias" altogether. Getting jurors to talk about their experiences, their attitudes, and the rules they developed as a result emphasizes that everyone brings a unique mindset into the courtroom. Strong attitudes and beliefs become the norm rather than the exception. In that context, the notion that it is difficult, and sometimes impossible, to set one's views aside can become easier to recognize and accept. It also becomes clear to jurors that they will have an easier time fulfilling the duty to be fair and impartial by serving on a case that doesn't touch on prior experiences and long-held beliefs.

The EAR approach has many advantages: it is easy to remember, easy to implement, and produces useful information. But the biggest overall benefit is that it allows you to do more listening and less talking, which is the best way to strike or challenge the right jurors.

Susan Macpherson is a founding member and Vice President of National Jury Project's Midwest regional office located in Minneapolis. She has been conducting jury research since 1976, and has advised attorneys across the country on complex commercial, antitrust, intellectual property, class action, and criminal cases. She is a contributor to National Jury Project's practice manual, JURYWORK: Systematic Techniques (Thomson West, updated annually). You can learn more about National Jury Project at www.njp.com or contact Susan Macpherson at smacpherson@njp.com.

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It is absolutely and totally not too late! Like what you read in *The Jury Expert*? Go straight to the sources! The annual conference for the American Society of Trial Consultants (ASTC) is in Atlanta, Georgia the first weekend in June. Hobnob with TJE authors. Meet trial consultants from around the country. Collect CLE's! Talk shop. Or don't! Take a look at what we have in store in Atlanta--visit our conference webpage here.

Editorial Exuberations

Spring is in full swing when it seems like the new calendars just went up on the wall. Our May issue is the biggest we've assembled yet both in size and in the range of ideas/perspectives incorporated. Thanks to your reading and suggestions we are continuing to evolve and expand. *The Jury Expert* is also on Twitter with daily links relevant to litigation and a few fun things to mull over your morning libations. Keep the feedback, ideas, and suggestions coming!

We are pleased to have a lengthy feature on the controversy about Generation Y and the prevalence of narcissism. We are publishing this issue on the heels of a heated debate in the blawgosphere on Generation Y in the legal workplace (see a summary of that controversy here). In a departure from our usual style of one author and several trial consultants reacting to the piece--in this case we have two articles (one saying narcissism is on the rise in our young people and the other begging to differ). Three experienced trial consultants with special interests in generational issues provide feedback on the articles and how this controversy relates to litigation advocacy and then both authors respond. This feature doesn't resolve the differences of opinion between the researchers but we hope it gives you a sense of how to use (or not use) generation and/or age in jury selection, case sequencing and narrative.

Our second academic feature is one of which we can all be proud. It's an exploration of just how the process of deliberating on a jury makes us better people and better citizens. How nice to hear something uplifting about the jury process for a change! Two past Presidents of the American Society of Trial Consultants respond to this article (ten years in the making) and then the authors follow-up with additional thoughts.

In addition, we have pieces on a wide range of issues from trial consultants: deception, juror stress, technology in high profile trials, questioning the child witness, using a simple mnemonic to aid you in organization in voir dire, and how to prepare expert witnesses. And of course, our favorite thing (two again this issue). It's a lot to ponder. Come back and visit the website and read to your hearts content! That's why we're here. Use us. --***Rita R. Handrich, PhD***

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